tially the same as ours, for cross-examination of Mr. Deane on his affidavit. The preliminary question arose whether the bank had any *locus standi* in the matter. Pennycuick J. at page 803 said:—

"I should add that if the bank has established that it was a creditor, I am very far from being persuaded that this is a case in which it would have been right for me in the exercise of my discretion under R.S.C., Ord. 38, r. 2(3), to direct cross-examination of Mr. Deane at the instance of the bank. The issue with which I am concerned is whether this company should be wound up. The matters which have been raised on behalf of the bank in Mr. Sykes' affidavit are all matters relating to the action. The bank complains of the manner in which the Board of Trade has carried on the action. It complains of the expenditure of public funds on the prosecution of the action and it complains of the Board of Trade's intention, if able to do so, to ratify the commencement of the action in the name of the company. More specifically it complains of certain matters relating to particulars and discovery. The evidence which has been filed on either side on these matters does not seem to me to be directly relevant to the question whether it is just and equitable that the company should be wound up on the petition of the Board of Trade, and I do not think that if I have a discretion in this matter I ought to exercise it by allowing cross-examination on those matters. They are only very indirectly relevant to the question which I will have to decide, namely, whether the winding up order should be made. Their relevance is to the action rather than to the question whether the company should be put into liquidation."

These cases are not to be read as laying down rules of universal application. If once it were taken as settled, then there is no room for the exercise of discretion but a rule of law is substituted for it. The power given by Order 38 rule 1 is obviously a matter of discretion to be exercised in accordance with well-known judicial principles.

In the present case there is only one issue, that is, the issue in the pending action which is whether the order of custody can be varied. The matter raised in the three affidavits are all matters relating to the action. The applicant complains that the respondent is no longer a fit and proper person to have custody of the child. The respondent says that she is still capable of looking after the child's religious and moral upbringing. The Rev. Father Wood supports her. It is the same as if he has sworn an affidavit to that effect. It is therefore only fair and proper that the appellant be allowed to cross-examine them on their affidavits.

Mr. Naidu further raises a technical question i.e., that the application to vary the order of custody is defective. He says that the application should have been commenced by way of motion: see *In re Holt.*[4] I do not feel disposed to adjudge on this point. In my view the appropriate time to raise it is at the hearing of the application to vary the said order.

I shall allow the application in terms of the prayer. The Registrar will fix a date for cross-examination of these persons.

Application allowed.

Solicitors: *R.K. Nathan & Co.*; *Braddell & Ramani.*

TAN SIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) March 10, 1967]

[Malacca — Criminal Apeal No. 40 of 1967]

Local Authority — Building plan — Deviation from approved plan — Continuing offence — Owner of building liable — Municipal Ordinance (S.S. Cap. 133), ss. 144(10)(b) and 392.

This was an appeal against the conviction of the appellant for an offence under section 144(10)(b) of the Municipal Ordinance for deviating from a specification approved by the Municipality. On appeal it was argued (1) that the complaint was not made within 12 months after the commission of the offence as required by section 392 of the Ordinance and therefore the appellants could not be liable to any fine or penalty and (2) that the appellant was not the owner of the land on which the building was erected and therefore he was wrongly charged and convicted.

Held, dismissing the appeal: (1) the offence in this case was a continuing offence and therefore section 392 of the Municipal Ordinance did not apply to it;

(2) the appellant was rightly charged and convicted as he was the owner of the building and as he had failed to comply with the approved plan of the existing building.

Cases referred to:—

(1) *Chepstow Electric Light & Power Co.* v. *Chepstow Gas & Coke Consumers' Co.* [1905] 1 K.B. 198

(2) *Thomas Welsh & Sons* v. *West Ham Corporation* [1900] 1 Q.B. 342.

(3) *Rex* v. *Taylor* [1908] 2 K.B. 237.

(4) *Marshall* v. *Smith* (1873), C.P. Cases 417.

(5) *Lim Beng Teck* v. *R.* [1957] M.L.J. 21.

(6) *Darus bin Ahmad* v. *Public Prosecutor* [1965] 1 M.L.J. 200.

(7) *Sivasupramaniam* v. *Public Prosecutor* [1968] 1 M.L.J. 80.

MAGISTRATE'S CRIMINAL APPEAL.

Thara Singh Sidhu for the appellant.

Abdullah bin Ghazali (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: I am of the opinion that this conviction must be affirmed. The proceedings were commenced by a complaint dated 27th September 1966 under section 144 (10)(b) of the Municipal Ordinance (Cap. 133) against the appellant (owner of the premises in question) for deviating from a specification approved by the Municipality.

On 17th July 1965 the appellant was given permission by the Municipality to effect certain repairs to his premises which was a temporary building with plank walls and attap roof and built on stills about 1 ft. 6 inches above ground level. The learned magistrate found as a fact that the appellant had deviated from the said specification i.e., it had now become a permanent (timber) building fixed to the ground with timber posts; the entire outer wall had been rebuilt to one storey in height and it had now a cement floor. With that finding I do not find disposed to interfere. The appellant was convicted and fined a sum of $50.

The appeal is based on two main grounds; (1) the complaint was not made within 12 months after the commission of the offence as required by section 392 of the Ordinance and therefore the appellants cannot be liable to any fine or penalty; (2) the appellant is not the owner of the land on which the building is erected and therefore he was wrongly charged and convicted. There are four other grounds of appeal which in my view do not merit consideration.

I will deal first with ground (1). Without going into the question as to when the building was rebuilt, the learned magistrate held that the case was a continuing offence and therefore section 392 does not apply. That section reads:—

"Except in any case where by reason of the act of omission complained of an injury or danger to health subsists at the date of the complaint, no person shall be liable to any fine or penalty under this Ordinance or under any rule or by-law made thereunder for any offence under this Ordinance unless the complaint respecting such offence is made within twelve months next after the commission of such offence."

He principally relied on *Chepstow Electric Light & Power Company* v. *Chepstow Gas & Coke Consumers' Co.*[1] In that case the Electric Company in October 1903 laid their electric lines near the mains of the Gas Company. On October 2, 1903 the Gas Company complained by letter that the electric lines were being laid in a manner which was injurious to the gas mains and required the lines to be relaid in a proper manner. Correspondence ensued between the two companies but the Electric Company did not comply with certain statutory requirements made by or on behalf of the Gas Company for protecting from injury their mains and other works and for securing access thereto. The matter went to arbitration and the finding was in favour of the Gas Company. On May 31, 1904 the Gas Company filed a complaint. The justices convicted the Electric Company. The main ground raised on appeal was whether or not the complaint was made more than (the statutory time limit of) 6 months from the completion of the commission of the offence. In his judgment Lord Alverstone C.J. at page 210 stated:—

"But a broader view may, I think be taken of this case — namely, that not conforming with one of these requirements, if it be a reasonable requirement, is put by the statute in the same position as disobedience to an order, and I doubt whether the time of limitation can be said to begin to run where persons are continuing to disobey an order which is always operative until it is obeyed."

Ridley J. held similar view:—

"Here the default alleged is a failure to comply with requisitions which are found to be reasonable . . . . In this case it seems to me impossible to say that it is complete at any particular moment for it continues to exist from day to day."

I believe the true principle applicable in the present case to be that propounded by Lord Alverstone C.J. and Ridley J. in the *Chepstow* case, *supra*. In the light of that decision, I take the view that where the execution of any work is an offence, in respect whereof the offender is liable in respect of any law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the law is a continuing offence. It continues so long as the failure to comply with the specification continues. As such section 392 does not apply to it. The cases cited for the appellant do not assist us. In *Thomas Welsh & Sons* v. *West Ham Corporation* [2] the question was, by whom was the continuing offence committed? *Rex* v. *Taylor* [3] was concerned with a limitation clause which is not similar to our section 392. *Marshall* v. *Smith* [4] was superseded by section 158 of the Public Health Act, 1875.

The second ground of appeal is based on the provisions of section 144(12) of the Ordinance and the decided cases: (see *Lim Beng Teck* v. *R.*;[5] *Darus bin Ahmad* v. *Public Prosecutor* [6] and *Sivasupramaniam* v. *Public Prosecutor* [7]). Section 144(12) reads:—

"Where any building operations are commenced or carried out in respect of any building, they shall be deemed to have been commenced or carried out by the owner of the land whereupon such building is erected and he shall be liable therefor."

I do not feel myself fettered by these decisions which differ considerably from the present. The reasoning there is applied to a different section of the Ordinance and to different facts. In all these cases the act complained of was the erection of new buildings in contravention of sub-section (7) and punishable under section 144(10)(a) and it was properly held that by virtue of subsection (12), the proper person to be charged was the owner of the land on which the building was erected and not the owner of the building.

I entertain no possible doubt that subsection (10)(a) is solely directed to the erection of a new building whereas the genesis and purpose of subsection (10)(b) is failure to comply with an approved plan or specification of an already existing building. An anomalous situation would arise if subsection (10)(a) is applicable to the facts of the present case. Let me give an illustration: Mr. *A* is the owner of a building which is built on Mr. *B*'s land. The former applied to the appropriate authority for an extension of his present building e.g., to build an extra bedroom. He put in his plan and it was approved. He deviated from that approved plan without written permission and instead put up two extra bedrooms. What is the appropriate charge? Commencing building operations in contravention of subsection (7) which is punishable under section 144(10)(a), or deviation from an approved plan without written permission under section 144(10)(b)? The answer must be the latter subsection. Will he or the owner of the land be charged for "deviation?" I think common sense and justice dictate that Mr. *A* would be the proper person to be charged and therefore in such a case as the present, it must be decided without reference to the provisions of subsection (10)(a).

I am of the opinion that the points raised for the appellant fail and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.*

NANYANG DEVELOPMENT (1966) SENDIRIAN BERHAD v. HOW SWEE POH

[O.C.J. (Raja Azlan Shah J.) March 11, 1967]
[K.L. — Originating Motion No. 1 of 1969]

Practice and Procedure — Application to court — Act not specifying form of — Whether originating mation correct procedure.

Land Laws — Caveat — Application to remove — Application by Originating Motion — Whether right declared in s. 326 of the National Land Code, 1965, is preliminary to that conferred by s. 327.

This was an application by way of originating motion to remove a caveat pursuant to section 327(1) of the National Land Code. On a preliminary objection by the respondent it was argued (1) that the procedure by originating motion adopted was irregular and misconceived; (2) that the application was premature as the preliminary step stipulated in section 326 of the National Land Code should be taken before making the application under section 327(1) of the Code.

Held: (1) where an Act of Parliament does not specify in what form an application may be made to court, the application may as a matter of procedure be made in any form in which the court can be moved and therefore the procedure by originating motion in this case was correct;

(2) the provisions of sections 325, 326 and 327 of the National Land Code provide three different avenues to different sets of people to remove a caveat and the right declared by section 326 is not a preliminary to that conferred by section 327.

Cases referred to:—

(1) *Lim Kiat Moy* v. *Hamzah* [1966] 2 M.L.J. 175.

(2) *In re Meister, Lucius and Bruning* [1914] W.N. 390.

ORIGINATING SUMMONS.

Wong Soon Foh for the applicants.

Eugene Lye for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: The applicant is the registered proprietor of 19 pieces of land (hereinafter referred to as the "said lands"). On or about the 10th January 1969 the respondent presented a Caveat, Presentation No. 287, Vol. XLI Folio 113 (hereinafter referred to as "the Caveat") against the said lands. The applicant applies by way of originating motion to remove the said caveat pursuant to section 327(1) of the National Land Code, 1965.

Mr. Eugene Lye for the respondent raised a preliminary objection. First, he says that the originating motion is irregular and misconceived. He contends that the provisions of the National Land Code are silent as to the procedure to be adopted in removing a caveat. He says that in such a case the procedure specified in the F.M.S. Land Code (Cap. 138) must be followed, that is, by way of originating summons. He cites sections 441 and 447(1) of the National Land Code and the case of *Lim Kiat Moy* v. *Hamzah*.[1]

The second limb of this argument is centred on the provisions of sections 326 and 327 of the Code. He says that the present application under section 327(1) of the National Land Code is premature. It is his contention that the preliminary step stipulated by section 326 should first be taken before embarking on the present application under section 327(1).

Mr. Wong Soon Foh, on behalf of the applicants contends that it is not irregular to initiate proceedings by way of originating motion. He relies on a passage in 1963 *Annual Practice* on page 1268:—

"Where a statute provides for an application to the court without specifying the form in which it is to be made, and the rules do not expressly provide for any special procedure, such application may usually be made by originating motion."

He answers Mr. Eugene Lye's second limb by saying that any person in the position of the applicants has an option to initiate proceedings